

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT JAMES CARTER,

Defendant-Appellant.

UNPUBLISHED

August 4, 2005

No. 254342

Wayne Circuit Court

LC No. 03-012067-01

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carjacking, MCL 750.529a, and felonious assault, MCL 750.82. He was sentenced to concurrent prison terms of eighty-four months to seventeen years on the carjacking conviction and two to four years on the felonious assault conviction. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise out of an incident in which a carjacker entered the victim's moving vehicle, attacked the victim with a hammer, and stole the vehicle. The victim was the only identifying witness. Defendant contends that he was denied due process and that the trial court clearly erred in upholding the admissibility of the victim's corporeal line-up identification of him as the carjacker. Defendant makes a two-part argument: First, the line-up was unduly suggestive based on variations in the line-up participants' clothing and physical characteristics; and second, the police department made procedural errors that caused the victim's identification to be potentially inaccurate.

Defendant's primary argument is that the trial court clearly erred, *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993),¹ by upholding the admissibility of the corporeal line-up identification despite variations in the line-up participants' clothing, age, weight, complexion, facial hair, and physical scarring. In particular, defendant challenges the line-up identification

¹ While there was no single majority opinion in *Kurylczyk*, all references to *Kurylczyk* in this opinion are to parts of Justice Griffin's lead opinion that constituted a majority holding. Specifically, Justice Mallett joined that lead opinion in its entirety, while Justice Boyle, joined by Justice Riley, joined in all relevant parts of the lead opinion. *Kurylczyk*, *supra* at 318 (Boyle, J.).

because the victim: 1) suffered multiple blows to the head during the struggle with her assailant, 2) was not wearing her glasses at the time of the incident, 3) provided the police with an initial description of her assailant that does not comport with defendant's physical characteristics, and 4) selected defendant from the line-up because the suggestive arrangement made him conspicuous. We conclude that the variations among the line-up participants were not significant enough to make the line-up unduly suggestive.

An identification procedure violates a defendant's right to due process when it is "so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk, supra* at 302. The line-up is "impermissibly suggestive" when the differences between the participants are so "readily apparent" that the witness makes his or her selection based on those differences rather than on actual recognition of the accused. See *People v Hornsby*, 251 Mich App 462, 466-467; 650 NW2d 700 (2002). "Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *Id.* at 466. Although the victim in this case testified that defendant initially stood out because of his clothing and the scratches on his face, we see no basis for concluding that there were readily apparent differences among the subjects in the line-up or that it was otherwise unduly suggestive.

Specifically, the record reflects that the officer in this case duly searched the cellblock for men who were similar in appearance to defendant and reasonably selected them based on their appearances rather than on their actual ages.² He corrected the only characteristic that he found made them readily distinguishable from one another, and the line-up attorney did not object to any of the participants. To expect there to be virtually no physical variation among live line-up participants is both unrealistic and unnecessary, and we perceive no indication that the differences among these men caused the line-up to be prejudicial to defendant. There were no dissimilarities so "unnecessarily suggestive and conducive to irreparable misidentification [that they] constitute[d] a denial of due process." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001).

² Officer Mark Burke testified that he selected four men in addition to defendant to participate in the corporeal line-up; the men were chosen based on their physical similarities to defendant, rather than on their chronological ages. The sole characteristic Officer Burke observed that he believed distinguished defendant from the other participants was defendant's braided hair. Thus, in order to make the line-up fair, he had all the men cover their hair with "do-rags." Officer Burke stated that he did not observe any scratches on defendant's face, nor did he find anything unique about any of the participants' clothing. Further, Officer Burke did not find any variation in the participants' height, weight, or facial hair to be remarkable. Finally, it may be inferred that the line-up attorney also found the line-up to be unbiased because he reviewed the participants and did not make any objections.

Defendant also argues that the trial court clearly erred in permitting the line-up identification to be admitted because the police department made procedural mistakes that caused the accuracy of the victim's identification to be questionable. Defense counsel argues that the officer's mistakes involving the line-up procedure and the associated form and photographs make it unclear which participant the victim actually identified.

Officer Burke testified that he completed the line-up form in the cellblock and that the men entered the observation room in reverse order from that listed on the form, causing #1 to become #5. However, as previously stated, the line-up attorney did not object to the line-up after reviewing it for forty-five seconds to one minute. In order to correct the mistake regarding the order, Officer Burke crossed out the word "left" on the line-up form and replaced it with the word "right." He also instructed the victim to make her selection from "right to left." The victim identified participant #2 from the right. It is apparent that Officer Burke merely corrected the form to reflect the manner in which the identification occurred.

Officer Burke also testified that the line-up photographs do not reflect the line-up as the victim actually viewed it because he failed to take the photographs immediately following the procedure and was therefore forced to reassemble the men. Although the participants had erroneously entered the observation room in reverse order, Officer Burke arranged them in the correct order (left to right) for the photographs, causing the line-up sheet and the photographs to appear as exact opposites of each other.

There is no evidence to suggest that the victim selected anyone other than defendant, or that she hesitated whatsoever in doing so. It is not significant that the procedure was performed from right to left, rather than left to right, but only that the record accurately reflects what occurred. Upon review of all the surrounding facts and circumstances, we conclude that the line-up was fair and that the selection was unambiguous. It is paramount that the victim testified that she selected defendant based on her recollection of his face, which she had the opportunity to view up-close for ten to fifteen minutes during their struggle. For these reasons, the trial court did not clearly err in allowing admission of the line-up identification. *Kurylczyk, supra* at 303.

Affirmed.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray